Supreme Court, U. S.
FILED
JAN 19 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1028

INSURANCE COMPANY OF NORTH AMERICA, *Petitioner,*

v.

ROBERT LEE MOSLEY, LIBERTY MUTUAL INSURANCE COMPANY, SEA TOWER APARTMENTS, and FLORIDA INDUSTRIAL RELATIONS COMMISSION, *Respondent.*

PETITION FOR WRIT OF CERTIORARI ON APPEAL FROM THE SUPREME COURT OF FLORIDA

FRANK E. MALONEY, JR.
FLEMING, O'BRYAN & FLEMING
Attorneys for Appellant
American National Bank Bldg.
Fort Lauderdale, Florida 33338

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
THE OPINIONS AND ORDERS OF THE COURTS BELOW	1
STATEMENT OF GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED	2
QUESTION PRESENTED	3
CONSTITUTIONAL AND STATUTORY SECTIONS INVOLVED IN THIS CASE	3
STATEMENT OF THE FACTS AND PROCEDURAL HISTORY ...	5
THIS WAS THE VERY FIRST NOTICE THAT INSURANCE COMPANY OF NORTH AMERICA EVER RECEIVED OF ANY ACCIDENT IN WHICH ITS POLICY MIGHT BE INVOLVED	11
REASONS FOR THE ALLOWANCE OF A WRIT OF CERTIORARI WITH BRIEFS ON THE MERITS AND ORAL ARGUMENT FOR RESOLUTION BY THE SUPREME COURT OF THE UNITED STATES	13
A. The Florida Courts Have Decided a Substantial Federal Question Contrary to the Laws and Policies of the United States and the Applicable Decisions of the Supreme Court of the United States	13

TABLE OF AUTHORITIES

Bobbie v. Connecticut, 91 S.Ct. 780, 401 U.S. 371, 28 L.Ed.2d 113, (1971)	15
Hornsby v. Allen, 326 F.2d 605, (5th Cir., 1964)	15
In Re Florida Workmen's Compensation Rules of Procedure, 285 So.2d 601, (Fla., 1973)	13
Leatherby Insurance Co. v. Jones, 332 So.2d 139, (Fla., 3rd DCA, 1976)	14
Shingleton v. Bussey, 233 So.2d 713, (Fla., 1969)	14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

INSURANCE COMPANY OF NORTH AMERICA, *Petitioner,*

v.

ROBERT LEE MOSLEY, LIBERTY MUTUAL INSURANCE COMPANY, SEA TOWER APARTMENTS, and FLORIDA INDUSTRIAL RELATIONS COMMISSION,* *Respondent.*

PETITION FOR WRIT OF CERTIORARI ON APPEAL FROM THE SUPREME COURT OF FLORIDA

COMES NOW the Petitioner INSURANCE COMPANY OF NORTH AMERICA, pursuant to Rule 19, Rules of the Supreme Court of the United States, and files this its Petition for Certiorari.

THE OPINIONS AND ORDERS OF THE COURTS BELOW

(1) Compensation Order entered by the Honorable P. A. Pacyna, Florida Judge of Industrial Claims, on January 2, 1976. (2a)

---

* The Florida Industrial Relations Commission has been made a party respondent as required by Florida Law, but it has no interest in the outcome of this Petition for Certiorari.

(2) Order of the Industrial Relations Commission, State of Florida, entered November 8, 1976. (8a)

(3) Order of the Supreme Court of Florida entered on June 30, 1977, denying certiorari jurisdiction, (13a) and Order of the Florida Supreme Court denying petition for rehearing dated October 21, 1977. (15a)

(4) Copies of all Orders and Opinions are not in any official reporter system. Those orders are attached to this Jurisdictional Statement as required by Rule 21 (1).

STATEMENT OF GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

(i) Petitioner INSURANCE COMPANY OF NORTH AMERICA, the second carrier, was bound by a quasi-judicial determination without opportunity to defend, when Respondent LIBERTY MUTUAL INSURANCE COMPANY, the first carrier, stipulated to a date of accident during the policy term of INA without INA being present.

Since that time the Florida Courts have forbidden INA the opportunity to challenge that stipulation made between LIBERTY MUTUAL and Claimant MOSLEY.

(ii) The Order of the Florida Judge of Industrial Claims was entered on January 2, 1976. An appeal was timely filed to the Florida Industrial Relations Commission and an order was entered on November 8, 1976.

There was no rehearing by the Judge of Industrial Claims or by the Industrial Relations Commission because none is provided for by Florida law.

(iii) This Court has jurisdiction over this case pursuant to 28 USC, § 1257 (3) and Rule 19 (a), Supreme Court Rules.

QUESTION PRESENTED

Did the Florida Courts Deprive the Petitioner Insurance Company of North America of Its Property Without Due Process of Law as Guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States by Binding the Petitioner to a Judicial Determination Made in Which the Petitioner Was Not a Party and Had No Notice Nor Opportunity to Defend?

CONSTITUTIONAL AND STATUTORY SECTIONS INVOLVED IN THIS CASE

United States Constitution

AMENDMENT [V.]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

§1 Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Constitution

ARTICLE 1, § 9

§ 9 Due process

No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

Florida Statutes

§ 440.41

440.41 *Substitution of carrier for employer*

In any case where the employer is not a self-insurer, in order that the liability for compensation imposed by this chapter may be most effectively discharged by the employer, and in order that the administration of this chapter in respect of such liability may be facilitated, the division shall by regulation provide for the discharge, by the carrier for such employer, of such obligations and duties of the employer in respect of such liability, imposed by this chapter upon the employer, as it considers proper in order to effectuate the provisions of this chapter. For such purposes:

(1) Notice to or knowledge of an employer of the occurrence of the injury shall be notice to or knowledge of the carrier.

(2) Jurisdiction of the employer by the judges of industrial claims, the division, the commission, or any court under this chapter shall be jurisdiction of the carrier.

(3) Any requirement by the judges of industrial claims, the division, the commission, or any court under any compensation order, finding, or decision shall be binding upon the carrier in the same manner and to the same extent as upon the employer.

Amended by Laws 1969, c. 69-106, §§ 17, 35; Laws 1975, c. 75-209, § 19, eff. June 25, 1975.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY*

This Workmen's Compensation case was tried on August 30th, 1973, with LIBERTY MUTUAL INSURANCE COMPANY defending as carrier, pursuant to the provisions of Chapter 440.41, Florida Statutes. At that trial LIBERTY MUTUAL and the Claimant MOSLEY stipulated to an accident of January 5, 1973, although the claim had been for accidents on September 9, 1969; March 25, 1969; December 15, 1972; December 22, 1972; December 29, 1972, and January 5, 1973.

The crucial period involved here are the months of December 1972 and January 1973. There is no question but that LIBERTY MUTUAL was the only workmen's compensation carrier in December of 1972 with a policy

---

* To comply with the requirements of the Supreme Court Rules, the petitioners will refer to page numbers in the record-on-appeal before the Florida Industrial Relations Commission which they have requested to be certified to this Court, pursuant to Rule 21, Supreme Court Rules. Said record has been paginated for use before the Florida Industrial Relations Commission and the Florida Supreme Court.

which covered the period January 1, 1972, through May 1, 1973.

In January of 1973 SEA TOWER APARTMENTS had three policies of workmen's compensation insurance:

LIBERTY MUTUAL—January 1, 1973, to January 1, 1974;

LIBERTY MUTUAL—January 1, 1972, to May 1, 1973; and

INSURANCE COMPANY OF NORTH AMERICA—January 1, 1973, to January 1, 1974

The older policy of LIBERTY MUTUAL was never cancelled. It expired on May 1, 1973. The newer policy was not effectively cancelled until March 28, 1973 (TR. 139).

On January 4, 1973, Claimant MOSLEY reported to his Employer SEA TOWER APARTMENTS *that he had been injured on December 22, 1972* (TR. 376). Several days later Mr. Mosley terminated his employment. The First Report of Injury filed by the employer on January 4, 1973, setting forth an accident date of December 22, 1972, *is the only First Report of Injury.*

Mr. Mosley began seeing his only treating physician, George T. F. Rahilly, M. D., on January 11, 1973. Mr. Mosley gave the doctor a history:

> "... The patient has not been seen in about three years. He has worked for the same employer in custodial work and approximately ten days before Christmas, which must have been about the 15th of December, he tried to push a container very large loaded with garbage when he strained his back. He continued to work and on Christmas Day did the same thing only this time his back really hurt and he reported it to the manager." (Report of Dr. Rahilly, TR. 313, Para. 1)

Dr. Rahilly then began treating Mr. Mosley for these December 1972 accidents.

Mr. Mosley retained an attorney to represent him in his workmen's compensation claim and the claim was filed on January 26, 1973 (TR. 62). This claim alleged industrial accidents on September 9, 1969; March 25, 1969; December 15, 1972; December 22, 1972; December 29, 1972; and January 5, 1973.

The claim was processed by the Department of Commerce and forwarded to LIBERTY MUTUAL, which received the notification on February 5, 1973. The first notice any carrier received was *31 days after the alleged accident* and INA's first notice of the alleged accident was August 30, 1973. Florida law provides that notice of injury must be given to the employer/carrier within 30 days of the incident.

In response to the claim, LIBERTY MUTUAL corresponded with Mr. Mosley's attorney *advising that* LIBERTY MUTUAL *was accepting the claim as being compensable under its policy.* This letter was dictated on February 14, 1973, and mailed to Attorney Nolan on February 20, 1973 (TR. 140 A).

Based on the only First Report of Injury prepared by the Employer SEA TOWER and Attorney Nolan's claim letter, LIBERTY MUTUAL opened a claim file. This claim file showed a date of accident of December 22, 1972, with disability commencing January 6, 1973. LIBERTY MUTUAL also filed its "Notice to Bureau that the payment of compensation has begun or has been suspended" showing the same dates (T. 133).

LIBERTY MUTUAL continued to defend the claim on the basis of the accident date of December 22, 1972, with disability commencing January 6, 1973, until August 30, 1973 (final hearing date).

During the time the claim was pending, Mr. Mosley continued his treatment with Dr. Rahilly. It was Dr. Rahilly's testimony that on January 31, 1973, he decided to hospitalize Mr. Mosley. He performed a myelogram which showed a ruptured disc, and on February 7, 1973, a laminectomy was done at the L-4/L-5 level. Dr. Rahilly explained:

> "It was basically a hollow or bag disc, which means that it was probably a long standing situation and had just been aggravated by this new accident." (TR. 340, Deposition of Dr. Rahilly, Pg. 8, L. 10-12)

The desired results were not achieved by this operation and the doctor recommended a stabilization surgically by fusion which the claimant was hesitant to undergo.

In the preparation of the defense of the claim LIBERTY MUTUAL took Dr. Rahilly's deposition. It was his testimony that all his treatment was related to the accidents of December 1972 (TR. 339), and he gave Mr. Mosley a 10% disability due to the December accidents and this was in addition to a 5% disability that he had received back in 1969 (TR. 341).

Dr. Rahilly did not feel that Mr. Mosley had reached maximum medical improvement because of the needed fusion. However, as to the laminectomy, he had reached maximum medical improvement on July 12, 1973. As to Mr. Mosley's ability to work, the doctor felt that there was little that he could do and that he certainly

could not continue to work as a laborer without the fusion (TR. 343).

LIBERTY MUTUAL deposed Mr. Mosley on August 8, 1973. He testified that he had worked primarily as a laborer all his life. He testified about the accidents in 1969 and December of 1972. He attempted to testify of the alleged accident of January 5, 1973, when the attorney representing LIBERTY MUTUAL *refreshed his memory of the events*:

> "Q. All right. Now, the boss reports that you got hurt on December 22nd, 1972. Now, that would be three days before Christmas. And that report was made out January 4th, 1973, so don't you think that probably the boss had the right date?
>
> "A. He probably did."
> (Deposition of Mr. Mosley, TR. 376, L. 14-18)

Final Hearing before Judge Carson took place on August 30, 1973 (TR. 147). It was announced by LIBERTY MUTUAL's attorney:

> "The parties have also stipulated that the Claimant sustained an injury by accident arising out of the course and scope of his employment on January 5, 1973." (TR. 159)

During this hearing LIBERTY MUTUAL also stipulated to coverage at the time of the accident.

As to the December 1972 injuries, LIBERTY MUTUAL admitted to the accidents, but took the position that no time had been lost and that there had been no medical treatment. Thus, no compensation had been awarded.

As to the accident of January 5, 1973, *to which* LIBERTY MUTUAL *stipulated,* this was defended on the

basis that LIBERTY MUTUAL had voluntarily paid all benefits due, pursuant to its February 20, 1973, letter (TR. 422).

It is interesting that LIBERTY MUTUAL would take this position at the hearing in that its own discovery had established that there was no accident in January of 1973 and, further, that all treatment rendered Mr. Mosley was for December accidents. The only possible explanation for such a change in position would be that LIBERTY MUTUAL was attempting to avoid any penalties for waiting longer than 21 days before accepting Mr. Mosley as being compensable.

Following the hearing Judge Carson entered his compensation order (September 7, 1973) finding that, by stipulation, the claimant had suffered an injury on January 5, 1973, which produced injury to the claimant's low back. Most likely Judge Carson could not have made these findings but for the stipulation of LIBERTY MUTUAL and the claimant. Dr. Rahilly (the treating doctor) had *testified that his treatment was for the December accidents* and Mr. Mosley (the claimant) had *testified it was a December 22nd accident and only that accident.*

The order went on to find Mr. Mosley to be permanently and totally disabled.

Following receipt of the order by LIBERTY MUTUAL, Mr. McBryde telephoned INA on September 12, 1973, and informed INA that it was the position of LIBERTY MUTUAL that LIBERTY MUTUAL did not have coverage for the January 5, 1973, accident, and that it was INA's responsibility. This telephone conversation was followed up by a letter from Mr. McBryde to INA dated September 13, 1973 (TR. 130).

THIS WAS THE VERY FIRST NOTICE THAT INSURANCE COMPANY OF NORTH AMERICA EVER RECEIVED OF ANY ACCIDENT IN WHICH ITS POLICY MIGHT BE INVOLVED.

LIBERTY MUTUAL did appeal Judge Carson's determination as to the extent of the disability. The Florida Industrial Relations Commission reversed Judge Carson and remanded for re-determination of the extent of Mr. Mosley's disability. At that point the case was assigned to the Honorable P. A. Pacyna.

This is the first time that INA was actually made a party to the cause.

Hearing was held before Judge Pacyna on November 21, 1975. At that hearing it was stipulated by the parties that the only matter to be determined was the respective liability of the carriers. Judge Pacyna rejected INA's defense that it would be denied procedural due process of law if it were required to respond to the Order of the Judge of Industrial Claims without a trial on the defenses it may have had against Mr. Mosley's claim.

Judge Pacyna entered an order directing each carrier to pay 50% of the determined benefits. LIBERTY MUTUAL appealed that order and INA cross-appealed.

By order of November 8, 1976, the Florida Industrial Relations Commission concluded that INA was solely responsible for the payment of benefits to Mr. Mosley for injuries arising out of the alleged industrial accident of January 5, 1973, in spite of the following:

> SEA TOWER never submitted a First Report of Injury for an accident in January of 1973;
>
> INA never received notification of any alleged accident involving Mr. Mosley;

LIBERTY MUTUAL set up one file with a December 22, 1972, accident date which showed disability from that accident commencing January 6, 1973;

INA never received a claim for compensation from a January 5, 1973, accident;

INA never received a notice of hearing for a hearing on the merits for any accident; and

INA knew nothing of an accident or the proceedings until after Judge Carson entered his Order determining that the claimant was permanently and totally disabled as a result of an accident which occurred on January 5, 1973.

INA first raised the issue of being deprived of due process of law at the first hearing it was a party to on November 21, 1975.

This issue was presented to the Florida Industrial Relations Commission through the following point:

> DID THE JUDGE OF INDUSTRIAL CLAIMS ERR IN NOT AWARDING THE INSURANCE COMPANY OF NORTH AMERICA A TRIAL DE NOVA ON THE ISSUE OF LIABILITY AFTER DETERMINING THAT THAT CARRIER WOULD HAVE RESPONSIBILITY ON THE CLAIM?

The issue was preserved on the Petition for Writ of Certiorari to the Florida Supreme Court:

> "DID THE INDUSTRIAL RELATIONS COMMISSION DEVIATE FROM THE ESSENTIAL REQUIREMENTS OF LAW AND THUS DENY AND DEPRIVE THE PETITIONER OF DUE PROCESS OF LAW AND ITS ESSENTIAL REQUIREMENTS IN THAT:
>
> (c) By entering an order which denied Petitioner INA a trial de nova on the issue of liability and failing to recognize that INA was a real party in interest and entitled to due process of the law;"

REASONS FOR THE ALLOWANCE OF A WRIT OF CERTIORARI WITH BRIEFS ON THE MERITS AND ORAL ARGUMENT FOR RESOLUTION BY THE SUPREME COURT OF THE UNITED STATES.

A. The Florida Courts Have Decided a Substantial Federal Question Contrary to the Laws and Policies of the United States and the Applicable Decisions of the Supreme Court of the United States.

Florida's Workmen's Compensation Law was first adopted in the 1935 Session of the Florida Legislature. Florida's Workmen's Compensation Law is patterned after the English Workmen's Compensation Law, the standard throughout the United States.

This law allows certain benefits to employees without being subject to the various common-law defenses. To obtain these benefits the parties (that is, the injured employee, the employer, and the workmen's compensation insurance carrier) were removed from the common-law trial process and governed by procedures established in Chapter 440, Florida Statutes. To insure due process, the Florida Legislature established a procedure where hearings on the merits were determined by Judges of Industrial Claims.

The Florida Supreme Court has recognized that this procedure, although not common law in nature, was more judicial than quasi-judicial in *In Re Florida Workmen's Compensation Rules of Procedure*, 285 So. 2d 601, (Fla., 1973).

From the very beginning of the Florida Workmen's Compensation Law, direct action was allowed against the workmen's compensation carrier, as a substitute party for the employer. See Section 440.41.

This statute was in degradation of the common law until 1969 when the Florida Supreme Court over-

turned the then-existing common law policy of no direct action by third-party beneficiaries against liability insurance carriers in the case of *Shingleton* v. *Bussey,* 233 So.2d 713, (Fla., 1969).

After *Shingleton, supra,* all liability insurance carriers found themselves in the position of workmen's compensation carriers in that they became the real party in interest in actions brought by injured plaintiffs.

In common-law actions against liability carriers the Florida courts have ruled that because insurance companies are now real parties in interest in claims by injured plaintiffs, they must be afforded the full rights of due process of law before they are deprived of their property. See *Leatherby Insurance Co.* v. *Jones,* 332 So.2d 139, (Fla., 3rd DCA, 1976).

The Judge of Industrial Claims, the Florida Industrial Relations Commission and the Florida Supreme Court were requested to afford these same rights of procedural due process to INA in this case, but they each refused to allow INA the right to be heard.

Under the Florida Workmen's Compensation Law, Chapter 440, certain valid defenses would have been available to INA had it been allowed to litigate them. Those defenses are:

(a) A First Notice of Injury, as is required by Florida law, was never filed for an accident of January 5, 1973.

(b) There was a failure of the employee to comply with the *30-day notice* requirement of injury and accident. The only notice of accident for January 5, 1973, to any carrier or employer in this action was the claim

being forwarded by the Industrial Relations Commission to Liberty Mutual *31 days after* January 5, 1973.

(c) There was, in fact, no accident on January 5, 1973. The treating physician testified that he was treating for accidents in December of 1972. The claimant himself testified, upon direct examination, that the accident was on December 22, 1972, and that he only had that one accident.

(d) If, in fact, there had been an incident on January 5, 1973, it merely was an exascerbation of a previous injury and would not have constituted a compensable accident. Dr. Rahilly's testimony was unrefuted that the disc removed was one of long-standing duration.

Instead of being allowed to raise these defenses, INA has been ordered to pay compensation without any proceeding whatsoever.

This Court has consistently held that any party whose property will be taken is entitled to procedural due process with notice and opportunity to defend. See *Bobbie* v. *Connecticut,* 91 S.Ct. 780, 401 U.S. 371, 28 L.Ed.2d 113, (1971).

These requirements apply also to any administrative proceeding where rights of person's property are determined. See *Hornsby* v. *Allen,* 326 F.2d 605, (5th Cir., 1964), which held that in an administrative proceeding of a judicial or quasi-judicial nature the parties must be given adequate notice and a fair hearing which conforms to the fair practices of Anglo-Saxon jurisprudence.

The policy established by the Florida Industrial Relations Commission in this case is in direct conflict

with the substantial Federal policy of assuring adequate notice and opportunity to defend by insurance carriers before their rights are adjudicated against them, particularly in cases where they are a real party in interest to the matter as established by Section 440.41, F.S.

If this policy is allowed to continue, all workmen's compensation carriers of Florida could be required and obligated to pay benefits without having the opportunity to be heard and to defend such claims.

It is respectfully submitted that this Court should grant pleniary consideration to this question with briefs on the merits and oral argument for its resolution.

FRANK E. MALONEY, JR.
of
FLEMING, O'BRYAN & FLEMING
Attorneys for Appellant
American National Bank Bldg.
Fort Lauderdale, Florida 33338

APPENDIX

APPENDIX

Compensation Order of P. A. Pacyna 2a
Order of Industrial Relations Commission 8a
Order of Supreme Ct. 6/30/77 ..... 13a
Order of Supreme Ct. 10/21/77 ..... 15a

STATE OF FLORIDA

OFFICE OF THE JUDGE OF INDUSTRIAL CLAIMS
DISTRICT J

CLAIM NO. 261-30-7754

DATE OF ACCIDENT: 3/25/69; 9/7/69; 12/15, 12/22 or 12/29/72; and 1/5/73

EMPLOYEE: Robert Lee Mosley
c/o Attorney

REPRESENTED BY: Gerald T. Nolan, Esq.
207 Medical Towers Bldg.
303 S.E. 17th Street, Ft. Lauderdale, Florida

EMPLOYER: Sea Tower Apartments
2840 N. Ocean Blvd., Ft. Lauderdale, Florida

CARRIER: Liberty Mutual Insurance Co.
P.O. Box 8097, Ft. Lauderdale, Florida

REPRESENTED BY: Anthony J. Beisler, Esq.
1650 N.E. 26th Street, Ft. Lauderdale, Florida

CARRIER: Insurance Company of North America
1575 West 49th Street, P.O. Box 2096
Hialeah, Florida 33012

REPRESENTED BY: Frank Hamilton, Esq.
P.O. Box 7028, 1415 East Sunrise Blvd.,
Ft. Lauderdale, Florida

COMPENSATION ORDER
OF
JUDGE OF INDUSTRIAL CLAIMS
P. A. PACYNA

AFTER DUE notice to the parties, hearing on the above entitled claim was conducted by the undersigned Judge of Industrial Claims at Fort Lauderdale, Broward County, Florida, on November 21, 1975.

The purpose of this hearing was tc determine benefits and compensation which the claimant was entitled to receive from the Sea Tower Apartments and to determine which of two insurance companies, i.e., the Insurance Company of North American or the Liberty Mutual Insurance Company was the workmen's compensation carrier for the Sea Tower Apartments on the date of the claimant's accident.

Present at the hearing held before me were the claimant and his counsel, Gerald T. Noland, Esquire; John Millican of the Insurance Company of North America and his counsel, Frank Hamilton, Esquire; and Robert Ralston of the Liberty Mutual Insurance Company and his counsel, Anthony J. Beisler, Esquire.

Upon consideration of the stipulations of the parties and the testimony in evidence presented in this cause, the undersigned finds:

1. The Judge of Industrial Claims has jurisdiction of the parties hereto and the subject matter hereof. Venue is proper.

2. The claimant, Robert Lee Mosley, asks for medical treatment, specifically being further surgery, to his low back and continuation of compensation for temporary total disability.

3. Sea Tower Apartments, by and through the Insurance Company of North America, avers that the proper insurance company to furnish benefits in compensation to the claimant, is the Liberty Mutual Insurance Company.

4. The Sea Tower Apartments, by and through the carrier, Liberty Mutual Insurance Company, avers that the

proper compensation carrier to furnish medical benefits and compensation to the claimant is the Insurance Company of North America.

5. At the hearing aforesaid, counsel for the two insurance companies involved did stipulate and I approve the stipulation to the effect that upon determining which insurance company was the proper carrier of the employer herein at the time of the claimant's industrial accident, that said carrier would furnish benefits in compensation to the claimant even though said carrier would seek review of such order as entered by the undersigned Judge of Industrial Claims. It was further stipulated, and I approve said stipulation, to the effect that the carrier would bring current, claimant's compensation for temporary total disability from the date compensation was last paid to the present time and to continue until maximum medical improvement is obtained.

6. The material issue to be resolved by the undersigned Judge of Industrial Claims, at this time is the determination of which of the two insurance carriers involved, i.e., Insurance Company of North America or the Liberty Mutual Insurance Company, was the insurer for workmen's compensation purposes of the Sea Tower Apartments commencing January 1, 1973. In order to resolve this issue I carefully considered the testimony of Mr. Seawell Osgood, president of the Sea Tower Board of Directors in the year 1972. I considered certain documentary evidence being correspondence pertaining to the particular insurance company, i.e., Insurance Company of North America or the Liberty Mutual Insurance Company with whom the Sea Tower Apartments desired to place its coverage for workmen's compensation purposes as well as liability insurance purposes in the year 1973. In further consideration of this issue I considered carefully the testimony of Mr. John Haun, the insurance broker who handled for the Sea Tower Apartments the obtaining of insurance for such employer.

I also considered carefully the testimony of Mr. Robert Ralston, Claims Supervisor of the Liberty Mutual Insurance Company, and his deposition testimony as well as the testimony of Mr. John Milliken, the Workmen's Compensation Supervisor for the Insurance Company of North America.

7. I have also carefully considered the defenses, re the question of coverage, raised by the Insurance Company of North America and the Liberty Mutual Insurance Company. In essence, it is the contention of Liberty Mutual Insurance Company that the Sea Tower Apartments elected to transfer their coverage for workmen's compensation insurance purposes effective January 1, 1973, from coverage with Liberty Mutual Insurance Company to coverage with the Insurance Company of North America. (It is noted by the undersigned Judge of Industrial Claims that the significant accident date, pursuant to earlier orders entered in this cause which I have considered, and which is primarily responsible for claimant's present disability, is that of January 5, 1973). The Insurance Company of North America contends in essence that Liberty Mutual Insurance Company is estopped at this time from denying coverage for the Sea Tower Apartments on January 5, 1973. In the alternative, that if the doctrine of estoppel is not applicable then there was dual coverage, i.e., coverage by both the Insurance Company of North America and Liberty Mutual Insurance Company for the employer, Sea Tower Apartments, on the date of claimant's accident of January 5, 1973.

8. Having carefully considered the testimony of the witnesses who appeared before me as well as their counsel and demeanor, and the documents placed in evidence, as well as applicable law cited by counsel for the parties, I find:

a. That on January 5, 1973, there was dual coverage, i.e., both the Insurance Company of North America and the Liberty Mutual Insurance Company, had, in full force

and effect, a workmen's compensation insurance policy insuring the employer, Sea Tower Apartments.

b. At the time of claimant's accident on December 29, 1972, the Liberty Mutual Insurance Company was the sole insurer for workmen's compensation insurance purposes of the employer, the Sea Tower Apartments.

c. The record of the proceedings had heretofore in this cause, as well as the orders heretofore entered do not contain evidence demonstrating that there were any permanent residuals flowing from claimant's accidents in December of 1972 and accordingly all of the evidence concerning the disability status of the claimant attributes such disability and a need for continuing medical attention to the accident of January 5, 1973. I recognize that there may have been a merger or combining of the injury suffered on January 5, 1973 with pre-existing conditions which existed prior to such accident date. However the issue of determination of whether there was a merger or combination or aggravation of a pre-existing condition is not before me at this time and will be the subject matter of subsequent hearing in this cause.

d. I specifically reject and deny the Insurance Company of North America's defense of estoppel and waiver.

Wherefore, it is the order of the undersigned Judge of Industrial Claims that the employer, The Sea Tower Apartments, by and through The Insurance Company of North America and The Liberty Mutual Insurance Company do furnish to the claimant compensation and medical benefits on a fifty-fifty basis. Compensation and benefits to be furnished at this time are:

1. Compensation for temporary total disability at the compensation rate of $66.00 per week from the date when Liberty Mutual suspended compensation on or about September 15, 1973, and to continue until maximum medical improvements in reached together with lawful interest on past due sums of compensation.

2. Furnish to claimant further medical benefits including but not limited to hospitalization and surgery for his low back injury.

3. Costs of these proceedings shall be borne in equal amounts by the Insurance Company of North America and the Liberty Mutual Insurance Company.

4. Jurisdiction is retained to determine date of maximum medical improvement, extent of permanent partial disability, costs to be awarded to claimant in the prosecution of his claim, reasonable attorney's fees to be awarded claimant's counsel, and any and all other issues not disposed of by the within order.

Done and Ordered at Fort Lauderdale, Broward County, Florida, this 2nd day of January 1976.

P. A. Pacyna
P. A. Pacyna
Judge of Industrial Claims

This Is to Certify that a copy of the foregoing order has been entered on the 2nd day of January 1976, and that a copy thereof was sent by certified mail to the employee, claimants, and by regular mail to all other interested parties at the last known addresses of each.

Althia Bell Dukes
Secretary to Judge of Industrial Claims

STATE OF FLORIDA
INDUSTRIAL RELATIONS COMMISSION

CL. NO. 261-30-7754

D/A. 3/25/69; 9/9/69; 12/22/72

SEA TOWER APARTMENTS; LIBERTY MUTUAL INSURANCE CO., *Appellants/Cross-Appellees*

v.

SEA TOWER APARTMENTS; INSURANCE COMPANY OF NORTH AMERICA, *Appellees/Cross-Appellants*

ROBERT LEE MOSLEY, *Claimant/Appellee*

ANTHONY J. BEISLER, Fort Lauderdale, for Appellants/Cross-Appellees

FLEMING, O'BRYAN & FLEMING, Fort Lauderdale, for Appellees/Cross-Appellants

LAW OFFICES OF NOLAN & USDAN, Fort Lauderdale, for Claimant/Appellee

Order

FRIDAY, Chairman.

The Judge of Industrial Claims entered an Order on January 2, 1976, which found that both carriers had coverage in behalf of the employer on the date of the accident in question, and required an equal contribution by each for future benefits, and denied reimbursement to Liberty Mutual Insurance Company for previous benefits voluntarily paid by it. The appellants filed an application for review by the Industrial Relations Commission of that Order, and present the following points on appeal:

> 1. Did the Judge of Industrial Claims err in ordering reinstitution of temporary total disability compensation benefits to the claimant from the date when Liberty Mutual suspended compensation, on or about September 15, 1973, and to continue until maximum medical improvement was reached?

> 2. Did Judge Pacyna err in finding there was dual coverage on January 5, 1973?
>
> 3. Did Judge Pacyna err in failing to direct the Insurance Company of North America to reimburse Liberty Mutual Insurance Company for all compensation benefits and medical benefits furnished to the claimant by Liberty Mutual Insurance Company because of the injury suffered by the claimant in the accident of January 5, 1973?

The history of this cause includes a previous compensation Order of October 3, 1973, which, among other things, found the claimant to be permanently and totally disabled. On appeal, this Commission reversed that finding, *Sea Tower Apartments* v. *Mosley*, IRC Order 2-2621 (May 27, 1974); cert. den. w/o opinion in *Mosley* v. *Sea Tower Apartments*, 326 So.2d 174 (Fla. 1975). The cause was remanded for the entry of a further Order fixing the amount of permanent partial disability to which claimant would be entitled, and resolution of the question of liability of the respective carriers. The Order entered by the Judge of Industrial Claims upon that remand is the subject of this appeal.

The record discloses that the employer, through its board of directors, in early December directed that its insurance coverage, specifically including workmen's compensation, be terminated as to Liberty, and replaced through INA. The evidence clearly shows that this was accomplished, through the employer directly with its insurance agency, and his testimony (R-40) is that he recommended that INA take over the workmen's compensation insurance on the expiration date of the existing policy with Liberty, which was January 1, 1973; that he subsequently received a letter from the president of the employer, dated December 14, 1972, Liberty Exhibit No. 1 (R-102), and that subsequently per Liberty Exhibit No. 2, (R104), the witness, as agent for INA, advised that the Liberty policy was

cancelled flat effective January 1, 1973, and that it had been replaced by INA policy no. NWC15-57-93; he further testified that he received the INA policy, effective January 1, 1973, whereupon he did return the Liberty policy to them, per Liberty Exhibit No. 2. At R-43 he further explains the purpose of this communication to Mutual as "To return the policy to Liberty Mutual with a cancellation back to its inception date, in order that there would be no earned premium under that policy chargeable to Sea Tower, . . .".

Thereafter, at R-44, he testifies that the employer had some claims forms from Liberty on hand, and (R-54) that on new accounts he generally advised his new clients to submit accident reports to his agency until they become acquainted with how to send them to the carrier itself, and . . .

> Q. And you advised them to submit accident reports to your agency until they became acquainted on how to submit them?
>
> A. No, I didn't. They had a procedure. The building manager had a procedure where he had already been filing these reports through Liberty since 19—I don't remember. I think the account had been since 1958 or 1959.
>
> • • •
>
> Q. Did you send along any instructions as to how they should file their claims?
>
> A. That procedure, to the best of my knowledge, comes directly from the Tampa office.
>
> Q. Well, my question to you is did you?
>
> A. No, sir, I did not.

As to Point 1 on appeal, the Order must be reversed insofar as it orders reinstitution of temporary total disability benefits. The parties to this cause had stipulated, which

stipulated is still acknowledged, to a settlement of that question, the Order is violative of that stipulated settlement, and therefore is reversed.

As to Point 2 on appeal, the Order must be reversed. The record clearly reflects that, beginning January 1, 1973, Liberty coverage for this employer was terminated and INA coverage for this employer was instituted. There is no competent substantial evidence to support a finding of dual coverage between these carriers, as purported by the Order, thus the record would permit no finding and holding except that sole coverage was with INA. The Order is accordingly reversed.

As to Point 3 on appeal, the Order must be reversed. The record clearly reflects that Liberty paid medical and compensation benefits because of the accident of January 5, 1973, through good faith error and misunderstanding, and at a time when coverage was with INA. They are entitled to reimbursement for those payments from INA, it was error for the Judge to deny that reimbursement, and the Order is accordingly reversed and remanded to the Judge of Industrial Claims for the entry of a further Order consistent with this opinion.

As to the points on cross-appeal, numbered 4 and 5, we conclude that the Order is correct as to each of them and affirm the Order with respect thereto.

The Order is accordingly affirmed in part, reversed in part, and reversed and remanded in part, as related.

The employer, Sea Tower Apartments, through its carrier, Insurance Company of North America, is directed to pay the sum of Five Hundred Dollars ($500.00) to counsel for appellee Robert Lee Mosley, for services rendered on this appeal.

It is so ordered.

INDUSTRIAL RELATIONS COMMISSION
Elmer O. Friday, Jr., Chairman
Leander J. Shaw, Jr., Commissioner

SEAL

THIS IS TO CERTIFY that on this November 8, 1976, the above Order was filed in the office of the Industrial Relations Commission at Tallahassee and a copy mailed to each party at his last known address.

INDUSTRIAL RELATIONS COMMISSION

/s/ BY R. AKINS
Deputy Clerk

cc: Philip A. Pacyna
Judge of Industrial Claims

SUPREME COURT OF FLORIDA

THURSDAY, JUNE 30, 1977

Case No. 50,710

INDUSTRIAL RELATIONS COMMISSION

INSURANCE COMPANY OF NORTH AMERICA, *Petitioner,*

vs.

ROBERT LEE MOSLEY, ET AL, *Respondents.*

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the Industrial Relations Commission and the Court finding no departure from the essential requirements of law, it is ordered that said petition be and the same is hereby denied. See: *Scholastic Systems, Inc., et al. vs. LeLoup, et al.,* 307 So. 2d 166 (Fla. 1974).

OVERTON, C. J., BOYD, ENGLAND and SUNDBERG, JJ., concur
ADKINS, J., dissents

The motion for attorney's fee filed by attorney for respondent, ROBERT LEE MOSLEY, is granted and said attorney is hereby allowed a fee of three-hundred and fifty dollars ($350) for services in this Court, said sum to be paid to said attorney by petitioner within fifteen days after final disposition of this cause.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

C
cc: Mrs. Verna Martin, Clerk

Hon. Frank E. Maloney, Jr.
of Fleming, O'Bryan & Fleming

Hon. Gerald T. Nolan
of Nolan & Usdan

Hon. Anthony J. Beisley

By: Dublin Causseaux
Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

FRIDAY, OCTOBER 21, 1977

Case No. 50,710

INSURANCE COMPANY OF NORTH AMERICA, *Petitioner,*

vs.

ROBERT LEE MOSLEY, ET AL, *Respondents.*

On consideration of the petition for rehearing filed by attorneys for petitioner, and reply thereto,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

OVERTON, C. J., BOYD, ENGLAND and SUNDBERG, JJ., Concur
ADKINS, J., Dissents

Motion for Attorney's Fees filed by attorneys for Respondent, ROBERT LEE MOSLEY, for services rendered in conjunction with Petition for Rehearing is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

C
cc: Mrs. Verna Martin, Clerk

Hon. Frank E. Maloney, Jr.
of Fleming, O'Bryan & Fleming
Hon. Dennis M. Usdan and
Hon. Gerald T. Nolan
of Nolan & Usdan
Hon. Anthony J. Beisler

By: Dublin Causseaux
Deputy Clerk

Supreme Court, U. S.
FILED
FEB 15 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1028

INSURANCE COMPANY OF NORTH AMERICA, *Petitioner*

v.

ROBERT LEE MOSLEY, LIBERTY MUTUAL INSURANCE COMPANY, SEA TOWERS APARTMENTS, AND FLORIDA INDUSTRIAL RELATIONS COMMISSION, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON APPEAL FROM THE SUPREME COURT OF FLORIDA

DAVID A. DANIELSON
ANTHONY J. BEISLER, P. A.
1650 N. E. 26th Street
Fort Lauderdale, Fla. 33305

THEODORE R. HAINLINE
HAINLINE & BILLING
200 S. E. Sixth Street
Fort Lauderdale, Fla. 33301

Attorneys for Respondents

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	2
ADDITIONAL STATUTORY SECTIONS INVOLVED IN THIS CASE	2
STATEMENT OF FACTS AND PROCEDURAL HISTORY	3
REASONS FOR DISALLOWANCE OF A WRIT OF CERTIORARI WITH BRIEFS ON THE MERITS AND ORAL ARGUMENT FOR RESOLUTION BY THE SUPREME COURT OF THE UNITED STATES	9

TABLE OF AUTHORITIES

FLORIDA STATUTE 440.42(3) 2, 7
FLORIDA STATUTE 440.41 ..... 9, 10
FLORIDA STATUTE 440.18 10

APPENDIX

ORDER OF INDUSTRIAL RELATIONS COMMISSION 1a
ORDER OF SUPREME COURT, June 30, 1977 ..... 6a
ORDER OF SUPREME COURT, October 21, 1977 ..... 8a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1028

INSURANCE COMPANY OF NORTH AMERICA, *Petitioner*

v.

ROBERT LEE MOSLEY, LIBERTY MUTUAL INSURANCE COMPANY, SEA TOWERS APARTMENTS, AND FLORIDA INDUSTRIAL RELATIONS COMMISSION, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON APPEAL FROM THE SUPREME COURT OF FLORIDA

COMES NOW THE Respondents, LIBERTY MUTUAL INSURANCE COMPANY and SEA TOWER APARTMENTS, pursuant to Rule 24, Rules of the Supreme Court of the United States, and files this its Brief in Opposition to Petition for Writ of Certiorari.

QUESTION PRESENTED

Did the Florida Courts Deprive the Petitioner Insurance Company of North America of Its Property Without Due Process of Law as Guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States by Binding the Petitioner to a Judicial Determination Made in Which the Petitioner Was Not a Party and Had No Notice Nor Opportunity to Defend?

ADDITIONAL STATUTORY SECTIONS INVOLVED IN THIS CASE

Florida Statutes

§ 440.42(3) INSURANCE POLICIES; LIABILITY.—

When there is any controversy as to which of two or more carriers is liable for the discharge of the obligations and duties of one or more employers with respect to a claim for compensation, remedial treatment or other benefits under this chapter, the division shall have jurisdiction to adjudicate such controversy; and if one of the carriers voluntarily or in compliance with a compensation order makes payments in discharge of such liability and it is finally determined that another carrier is liable for all or any part of such obligations and duties with respect to such claim, the carrier which has made payments either voluntarily or in compliance with a compensation order shall be entitled to reimbursement from the carrier finally determined to be liable, and the division shall have jurisdiction to order such reimbursement; provided, however, that if the carrier finally determined liable can demonstrate that it has been prejudiced by lack of knowledge or notice of its potential liability, such reimbursement shall be only with respect to payments made after it had knowledge or notice of its potential liability.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY *

Petitioner's selective statement of the facts imply that there was no January 5, 1973, accident, that Sea Tower Apartments, the employer herein, had no notice of a January 5, 1973, accident and that Liberty Mutual Insurance Company, through some sort of contrivance, stipulated to a January 5, 1973, accident so as to place responsibility upon Insurance Company of North America. The facts clearly do not support such implications.

The evidence presented to Judge Carson clearly supports an accident occurring on January 5, 1973. The claimant testified at his deposition (TR-375-376) as follows:

> Q. When you first got hurt, Mr. Mosley, did you keep on working?
>
> A. That's what I'm trying to study now. You see, I worked—When I left off the job was January 5th. That was the day that the pull, that I really pulled my back.
>
> Q. Was that again on the Dumpster?
>
> A. That was on the Dumpster.
>
> Q. Now, that was what day, sir?
>
> A. That was January 5th.

The Claimant further testified at TR-382 as follows:

> Q. Then on January 5th, were you pushing a Dumpster? That was also a Friday.

---

* To comply with the requirements of the Supreme Court Rules, the respondents will refer to page numbers in the record-on-appeal before the Florida Industrial Relations Commission. Said record has been paginated for use before the Florida Industrial Relations Commission and the Florida Supreme Court.

A. Right.

Q. And what happened when you pushed the Dumpster on January 5th?

A. That's when I felt something just like something click.

MR. BEISLER: Double click, huh? Click and double click.

Q. Pulling apart?

A. Right.

Q. Okay. Then after these things happened, did you report these to a manager by the name of Vince?

A. I did.

Q. Okay. And was there also a man that had something to do with the Sea Tower named Bergander or something like that?

A. Bergander, yeah.

Q. Now, who is he?

A. He was the—He was the—I can't remember the name. Supervisor or—

Q. Chairman or something like that?

A. Chairman.

Q. All right. Was he aware of both of these episodes?

A. Oh, yes. He was aware of it.

The Claimant's testimony at the trial was unchanged. In Tr. 168-170, the Claimant related the January 5th accident and reporting the same to his employer:

Q. Now, what happened to you on January 5th, of this year, 1973?

A. Well, we had done told them—I had done told them about two or three times about that front wheel on this here dumpster. Instead of rolling straight down the trace—they had a deep track there—well, the wheel Instead of rolling straight ahead comed over and was bound against the side—the metal.

Well, I had done told them two or three times they were bound. And, so, when we get ready to push it out of there, we have to get a bar and stick up under there and get it rolling. Sometimes, we would get it right in the door and it would still bind on us. We would have to put that bar back up under there to get it out.

As I was getting it out I felt this here pull, like something pulled loose. So, then, I went and reported again, and I left again. And, after I got in, I told him I was going to have to go to the doctor with my back.

Q. Did you hurt the same part of your back on January 5th, as you had hurt in the past?

A. Yes, and I told them I had to go to the doctor.

Q. Who did you tell that to?

A. The manager.

Q. Is that Mr. Vince, again?

A. Right. And, so, they told me I would have to go to the company doctor.

Q. Who was that?

A. This young fellow in Pompano.

Q. Dr. Monserrate?

A. I believe so. That was the one when I went up there. I went to him. When he got to me, he

took x-rays. That was on the 8th. He put me on a table—before he took the x-rays, he put me on a table and pulled my legs. I said, Doctor you are hurting me. He kept on yanking on me, and took the x-rays, and told me to come back in four days.

The January 5, 1973, accident date is also supported by the Claimant's testimony on TR 172, as well as that of his wife at TR 191. Furthermore, the January 5th accident date appears on the S.F.-2 Form of the first treating physician, Dr. Monserrate. (TR. 318).

The evidence clearly supports a January 5th date of accident and proper notice to the employer. The Claimant testified to notifying the manager, Mr. Vince, following the January 5th occurrence. The employer sent the Claimant to Dr. Monserrate and later authorized a change of physicians to Dr. Rahilly. (TR. 169-170) This is supported by the SF-2 form of Dr. Monserrate which indicates that his services were engaged by Sea Tower Apartments. (TR. 318)

These important facts are entirely omitted from the Petitioner's Statement of the Facts.

These facts, based on sworn testimony and other evidence in the record, clearly support the Claimant's industrial accident of January 5, 1973. They further support notice to the employer within 30 days of the January 5, 1973, accident.

Stipulations by Liberty Mutual at the hearing before Judge Carson on August 30, 1973, are clearly supported by the evidence adduced prior to and at that hearing.

Judge Carson entered his compensation order on September 7, 1973. (TR. 390-401) Following receipt

of that order by Liberty Mutual, Mr. McBryde telephoned Insurance Company of North America on September 12, 1973, and informed INA that it was the position of Liberty Mutual that Liberty did not have coverage for the January 5, 1973, accident and that it was INA's responsibility. The telephone conversation was followed up with a letter from Mr. McBryde dated September 13, 1973. (TR. 130). This was done in accordance with Florida Statute 440.42(3) which pertinent part states as follows:

> When there is any controversy as to which of two or more carriers is liable for the discharge of the obligations and duties of one or more employers with respect to a claim for compensation, remedial treatment or other benefits under this chapter, the division shall have jurisdiction to adjudicate such controversy; and if one of the carriers voluntarily *or in compliance with a compensation order* makes payments in discharge of such liability and it is finally determined that another carrier is liable for all or any part of such obligations and duties with respect to such claim, the carrier which has made payments either voluntarily *or in compliance with a compensation order* shall be entitled to reimbursement from the carrier finally determined liable, and the division shall have jurisdiction to order such reimbursement; provided, however, that if the carrier finally determined liable can demonstrate that it has been prejudiced by lack of knowledge or notice of its potential liability, such reimbursement shall be only with respect to payments made after it had knowledge or notice of its potential liability. (Emphasis supplied).

Judge Carson's order of September 7, 1973, was vacated but subsequently re-instated on October 3,

1973. (TR. 407-408). From that order a timely application for review was filed in behalf of the carrier and employer. (TR. 411-414).

The Industrial Relations Commission, on May 27, 1974, entered its order reversing the order of the Judge of Industrial Claims and remanding the case to Fort Lauderdale for reconsideration and the entry of an appropriate order fixing the amount of disability to which the Claimant was entitled and determining the liability of the respective carriers. (TR. 444-451).

The order of the Industrial Relations Commission reversed the order of the Judge of Industrial Claims and Petition for Certiorari was timely filed in behalf of the employee/claimant. The Petition for Certiorari was denied and the Industrial Relations Commission order of May 27, 1974, affirmed. The cause was then re-assigned to Judge Pacyna for further proceedings in accordance with the Industrial Relations Commission Order of May 24, 1974, i.e., fixing the amount of disability to which the Claimant was entitled and determining the liability of the respective carriers.

On November 21, 1975, hearing was conducted before Judge P. A. Pacyna to determine the responsibility between the respective carriers. Primary defenses raised by Insurance Company of North America at that hearing were estoppel and waiver. (TR. 89-90). These were specifically rejected by Judge Pacyna's order of January 2, 1976. Judge Pacyna's order directed each carrier to pay fifty (50%) percent of the determined benefits. Liberty Mutual appealed that order and INA cross-appealed. (TR. 454-460).

By order of November 8, 1976, the Florida Industrial Relations Commission concluded that INA was

solely responsible for the payment of benefits to Mr. Mosley for injuries arising out of the industrial accident of January 5, 1973. (1a).

Petition for Certiorari was filed with the Supreme Court of the State of Florida. This petition was denied and the Industrial Relations Commission's order of November 8, 1976, affirmed on June 30, 1977. (2a). INA sought petition for rehearing and same was denied by order of the Supreme Court of Florida on October 21, 1977. (3a).

REASONS FOR DISALLOWANCE OF A WRIT OF CERTIORARI WITH BRIEFS ON THE MERITS AND ORAL ARGUMENT FOR RESOLUTION BY THE SUPREME COURT OF THE UNITED STATES

Florida Statute 440.41 provides as follows:

Florida Statutes

§ 440.41 SUBSTITUTION OF CARRIER FOR EMPLOYER.—

In any case where the employer is not a self insurer, in order that the liability for compensation imposed by this chapter may be most effectively discharged by the employer, and in order that the administration of this chapter in respect of such liability may be facilitated, the division shall by regulation provide for the discharge, by the carrier for such employer, of such obligations and duties of the employer in respect of such liability, imposed by this chapter upon the employer, as it considers proper in order to effectuate the provisions of this chapter. For such purposes

(1) *Notice to or knowledge of an employer of the occurance of the injury shall be notice to or knowledge of the carrier;*

(2) Jurisdiction of the employer by the division, the commission, or any court under this chapter shall be jurisdiction of the carrier; and

(3) Any requirement by the division, the commission, or any court under any compensation order, finding, or decision shall be binding upon the carrier in the same manner and to the same extent as upon the employer. (Emphasis supplied).

INA's contention that they were denied the opportunity to defend against the accident of January 5, 1973, or notice thereof, is frivolous or without merit at best.

The record is clear that notice of the injury was given to the employer by the Claimant. It was given to Mr. Vince and to Mr. Bergander. (TR. 382). Furthermore, the employer sent the injured Claimant *to Dr. Monserrate within three days* of the incident which clearly is within the 30 day period for giving notice of injury under F. S. 440.18. *Under F. S. 440.41, notice to the employer is notice to the carrier.* Florida adopted Sections 440.41 and 440.42(3) to resolve or prevent the very issues that INA seeks to raise in this case and thereby defeat one of the self-administrating features of the Workmen's Compensation Act. The employer's knowledge of the Claimant's accident on January 5, 1973, constituted notice to the carrier of that accident. (F. S. 440.41(1)).

Respondent submits the Florida Industrial Relations Commission and the Supreme Court of the State of Florida applied the appropriate law to the instant case. The Insurance Company of North America's argument that their rights were prejudiced and that they were denied due process by Liberty Mutual's

stipulating to an accident of January 5, 1973, is contrary to the evidence and the law. Sea Tower Apartments had knowledge of the January 5, 1973, accident. Liberty Mutual Insurance Company conducted a defense on behalf of the employer for all alleged dates of accidents. The INA contention that the stipulation by Liberty Mutual to the January 5, 1973 accident was not supported by the evidence or was prejudicial to the ultimate outcome of the case is contrary to the evidence and the law. (See Industrial Commission's order of November 8, 1976, in Appendix 8a of Petitioner's brief.)

The Workmen's Compensation law of Florida is intended to be self administering. To grant INA a trial de nova under the facts in this case on the alleged grounds of denial of due process would be to defeat the purposes of the Act. The Florida Industrial Relations Commission and the Florida Supreme Court have properly determined the issue of due process in this case. There is no substantial federal question to justify the United States Supreme Court taking jurisdiction in this case. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DAVID A. DANIELSON
ANTHONY J. BEISLER, P. A.
1650 N. E. 26th Street
Fort Lauderdale, Fla. 33305

THEODORE R. HAINLINE
HAINLINE & BILLING
200 S. E. Sixth Street
Fort Lauderdale, Fla. 33301

Attorneys for Respondents

APPENDIX

STATE OF FLORIDA
INDUSTRIAL RELATIONS COMMISSION

CL. No. 261-30-7754

D/A. 3/25/69; 9/9/69; 12/22/72

SEA TOWER APARTMENTS; LIBERTY MUTUAL INSURANCE CO., *Appellants/Cross-Appellees*

v.

SEA TOWER APARTMENTS; INSURANCE COMPANY OF NORTH AMERICA, *Appellees/Cross-Appellants*

ROBERT LEE MOSLEY, *Claimant/Appellee*

Anthony J. Beisler, Fort Lauderdale, for Appellants/Cross-Appellees

Fleming, O'Bryan & Fleming, Fort Lauderdale, for Appellees/Cross-Appellants

Law Offices of Nolan & Usdan, Fort Lauderdale, for Claimant/Appellee

(RECEIVED NOVEMBER 9, 1976)

Order

FRIDAY, Chairman.

The Judge of Industrial Claims entered an Order on January 2, 1976, which found that both carriers had coverage in behalf of the employer on the date of the accident in question, and required an equal contribution by each for future benefits, and denied reimbursement to Liberty Mutual Insurance Company for previous benefits voluntarily paid by it. The appellants filed an application for review by the Industrial Relations Commission of that Order, and present the following points on appeal:

1. Did the Judge of Industrial Claims err in ordering reinstitution of temporary total disability compen-

sation benefits to the claimant from the date when Liberty Mutual suspended compensation, on or about September 15, 1973, and to continue until maximum medical improvement was reached?

2. Did Judge Pacyna err in finding there was dual coverage on January 5, 1973?

3. Did Judge Pacyna err in failing to direct the Insurance Company of North America to reimburse Liberty Mutual Insurance Company for all compensation benefits and medical benefits furnished to the claimant by Liberty Mutual Insurance Company because of the injury suffered by the claimant in the accident of January 5, 1973?

The history of this cause includes a previous compensation Order of October 3, 1973, which, among other things, found the claimant to be permanently and totally disabled. On appeal, this Commission reversed that finding, *Sea Tower Apartments* v. *Mosley,* IRC Order 2-2621 (May 27, 1974); cert. den. w/o opinion in *Mosley* v. *Sea Tower Apartments,* 326 So.2d 174 (Fla. 1975). The cause was remanded for the entry of a further Order fixing the amount of permanent partial disability to which claimant would be entitled, and resolution of the question of liability of the respective carriers. The Order entered by the Judge of Industrial Claims upon that remand is the subject of this appeal.

The record discloses that the employer, through its board of directors, in early December directed that its insurance coverage, specifically including workmen's compensation, be terminated as to Liberty, and replaced through INA. The evidence clearly shows that this was accomplished, through the employer directly with its insurance agency, and his testimony (R-40) is that he recommended that INA take over the workmen's compensation insurance on the expiration date of the existing policy with Liberty, which

was January 1, 1973; that he subsequently received a letter from the president of the employer, dated December 14, 1972, Liberty Exhibit No. 1 (R-102), and that subsequently per Liberty Exhibit No. 2, (R-104), the witness, as agent for INA, advised that the Liberty policy was cancelled flat effective January 1, 1973, and that it had been replaced by INA policy no. NWC15-57-93; he further testified that he received the INA policy, effective January 1, 1973, whereupon he did return the Liberty policy to them, per Liberty Exhibit No. 2. At R-43 he further explains the purpose of this communication to Mutual as "To return the policy to Liberty Mutual with a cancellation back to its inception date, in order that there would be no earned premium under that policy chargeable to Sea Tower, . . .".

Thereafter, at R-44, he testifies that the employer had some claims forms from Liberty on hand, and (R-54) that on new accounts he generally advised his new clients to submit accident reports tc his agency until they become acquainted with how to send them to the carrier itself, and . . .

Q And you advised them to submit accident reports to your agency until they became acquainted on how to submit them?

A No, I didn't. They had a procedure. The building manager had a procedure where he had already been filing these reports through Liberty since 19—I don't remember. I think the account had been since 1958 or 1959.

• • •

Q Did you send along any instructions as to how they should file their claims?

A That procedure, to the best of my knowledge, comes directly from the Tampa office.

Q Well, my question to you is did you?

A No, sir, I did not.

As to Point 1 on appeal, the Order must be reversed insofar as its orders reinstitution of temporary total disability benefits. The parties to this cause had stipulated, which stipulation is still acknowledged, to a settlement of that question, the Order is violative of that stipulated settlement, and therefore is reversed.

As to Point 2 on appeal, the Order must be reversed. The record clearly reflects that, beginning January 1, 1973, Liberty coverage for this employer was terminated and INA coverage for this employer was instituted. There is no competent substantial evidence to support a finding of dual coverage between these carriers, as purported by the Order, thus the record would permit no finding and holding except that sole coverage was with INA. The Order is accordingly reversed.

As to Point 3 on appeal, the Order must be reversed. The record clearly reflects that Liberty paid medical and compensation benefits because of the accident of January 5, 1973, through good faith error and misunderstanding, and at a time when coverage was with INA. They are entitled to reimbursement for those payments from INA, it was error for the Judge to deny that reimbursement, and the Order is accordingly reversed and remanded to the Judge of Industrial Claims for the entry of a further Order consistent with this opinion.

As to the points on cross-appeal, numbered 4 and 5, we conclude that the Order is correct as to each of them and affirm the Order with respect thereto.

The Order is accordingly affirmed in part, reversed in part, and reversed and remanded in part, as related.

The employer, Sea Tower Apartments, through its carrier, Insurance Company of North America, is directed to pay the sum of Five Hundred Dollars ($500.00) to counsel for appellee Robert Lee Mosley, for services rendered on this appeal.

It is so ordered.

INDUSTRIAL RELATIONS COMMISSION
ELMER O. FRIDAY, JR., Chairman
LEANDER J. SHAW, JR., Commissioner

THIS IS TO CERTIFY that on this November 8, 1976, the above Order was filed in the office of the Industrial Relations Commission at Tallahassee and a copy mailed to each party at his last known address.

INDUSTRIAL RELATIONS COMMISSION

/s/ By R. AKINS
Deputy Clerk
(Title)

SEAL
cc: Philip A. Pacyna
Judge of Industrial Claims

SUPREME COURT OF FLORIDA

THURSDAY, JUNE 30, 1977

Case No. 50,710

INDUSTRIAL RELATIONS COMMISSION
INSURANCE COMPANY OF NORTH AMERICA, *Petitioner,*

vs.

ROBERT LEE MOSLEY, ET AL, *Respondents.*

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the Industrial Relations Commission and the Court finding no departure from the essential requirements of law, it is ordered that said petition be and the same is hereby denied. See: *Scholastic Systems, Inc., et al. vs. LeLoup, et al.,* 307 So. 2d 166 (Fla. 1974).

OVERTON, C. J., BOYD, ENGLAND and SUNDBERG, JJ., concur
ADKINS, J., dissents

The motion for attorney's fee filed by attorney for respondent, ROBERT LEE MOSLEY, is granted and said attorney is hereby allowed a fee of three-hundred and fifty dollars ($350) for services in this Court, said sum to be paid to said attorney by petitioner within fifteen days after final disposition of this cause.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

C

cc: Mrs. Verna Martin, Clerk

Hon. Frank E. Maloney, Jr.
of Fleming, O'Bryan & Fleming

Hon. Gerald T. Nolan
of Nolan & Usdan

Hon. Anthony J. Beisley

By: Dublin Causseaux
Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

FRIDAY, OCTOBER 21, 1977

Case No. 50,710

INSURANCE COMPANY OF NORTH AMERICA, *Petitioner*,

vs.

ROBERT LEE MOSLEY, ET AL., *Respondents*.

On consideration of the petition for rehearing filed by attorneys for petitioner, and reply thereto,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

OVERTON, C. J., BOYD, ENGLAND and SUNDBERG, JJ., Concur
ADKINS, J., Dissents

Motion for Attorney's Fees filed by attorneys for Respondent, ROBERT LEE MOSLEY, for services rendered in conjunction with Petition for Rehearing is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

C

cc: Mrs. Verna Martin, Clerk
Hon. Frank E. Maloney, Jr.
of Fleming, O'Bryan & Fleming
Hon. Dennis M. Usdan and
Hon. Gerald T. Nolan
of Nolan & Usdan
Hon. Anthony J. Beisler

By: Dublin Causseaux
Deputy Clerk